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SHORT TITLE Pacific Employrs. Ins. Co. DOCKETED: Jun 11 1985
VERSUS M/V Capt., et al.

Entry	Date	Note	Proceedings and Orders
1	Jun 11 1985	D	Petition for writ of certiorari filed.
3	Jul 1 1985		Order extending time to file response to petition until July 31, 1985.
4	Jul 29 1985		Brief of respondents M/V Capt. W.D. Gargill, et al. in opposition filed.
5	Jul 31 1985		DISTRIBUTED. September 30, 1985
7	Oct 7 1985		REDISTRIBUTED. October 11, 1985
8	Oct 15 1985		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.) Justice Blackmun OUT.

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PETITION FOR WRIT OF CERTIORARI

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84-1928

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner,

V.

M/V CAPT. W. D. CARGILL, her engines, tackle, apparel, furniture, etc., *in rem*, and THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION, LTD., *in personam*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the Court of Appeals erred in holding, contrary to the rule of the Second, Third, Seventh, Eighth, Ninth and District of Columbia Circuits, that its review of the District Court's decision dismissing petitioner's declaratory judgment action was limited to whether the District Court abused its discretion.

2) Whether the Court of Appeals erred in affirming the District Court's failure to heed the clear admonition of that portion of Rule 57 of the Federal Rules of Civil Procedure stating that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

3) Whether the Court of Appeals erred in failing to reverse the District Court's decision denying petitioner, a United States citizen, access to a United States court and remitting petitioner to a Belgian forum and the vagaries of foreign law where the critical incident occurred on the very doorstep of the District Court.

4) Whether the Court of Appeals erred in affirming the decision below on the basis of evidence which petitioner was afforded no opportunity to rebut or controvert.

STATEMENT OF INTERESTED PARTIES

Petitioner, Pacific Employers Insurance Company, is understood to be a wholly owned subsidiary of Insurance Company of North America, now part of CIGNA Corporation.

It is understood that M/V CAPT. W. D. CARGILL was, at the time of the incident from which this litigation arose, owned and operated by Tradax Export, S.A., a wholly owned subsidiary of Cargill, Incorporated of Minneapolis, Minnesota.

The United Kingdom Mutual Steam Ship Assurance Association Limited is a Mutual Protection and Indemnity Association domiciled in London.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner,

V.

M/V CAPT. W. D. CARGILL, her engines, tackle, apparel, furniture, etc., *in rem*, and
THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE
ASSOCIATION, LTD., *in personam*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DECISIONS BELOW

The opinion of the Court of Appeals is included herein as Appendix A. It is reported at 751 F.2d 801 (5th Cir. 1985). The judgment of the Court of Appeals is contained in Appendix B. On March 15, 1985, the Court of Appeals denied petitioner's application for rehearing. The order is contained in Appendix C. The opinion of the District Court for the Eastern District of Louisiana is not reported. It is contained in Appendix D. The final judgment of the District Court is contained in Appendix E.

JURISDICTION

The District Court entered its final judgment on February 17, 1984. A timely appeal was taken, and the Court of Appeals for the Fifth Circuit affirmed. A petition for rehearing was denied by order dated March 15, 1985.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. §2201 (The Declaratory Judgment Act):

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Rule 57, Federal Rules of Civil Procedure:

> The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in

> the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing in an action for a declaratory judgment and may advance it on the calendar.

STATEMENT OF THE CASE

Although no earth shaking constitutional issue is presented by this application for a writ, petitioner seeks a review by your Honors of the decision below so that a conflict in the circuits may be resolved and a most useful procedural tool - the declaratory relief provisions of the law - may be made more readily available to litigants, as the Congress intended.

Plaintiff below, Pacific Employers Insurance Company ("Pacific Employers") was the California insurer of a cargo of soybeans moving from Baton Rouge, Louisiana to Hamburg, West Germany on the M/V CAPT. W. D. CARGILL in 1976. When on the way down the Mississippi River to sea, the ship's engines failed and she lost her steering power. Claiming she was about to collide with a workboat with potential loss of life and substantial property damage, her Master dropped her anchors. The anchors dragged over certain pipelines then being laid in the bed of the River, severely damaging them. She continued her voyage and ultimately outturned her cargo at Hamburg undamaged.

The CARGILL was insured against liability for the pipeline damage by The United Kingdom Mutual Steam Ship Assurance Association Limited, a British Protection

and Indemnity Club (the "U.K. Club"), which paid the pipeline damage claim of approximately $4,000,000.

Upon arrival at Hamburg, the CARGILL interests declared a general average and submitted the matter for adjustment to the "Collage Van Dispacheurs", average adjusters at Antwerp, who found the pipeline damage to be recoverable in part from Pacific Employers, the cargo underwriters, as an item in the general average adjustment. Upon being notified of this finding, Pacific Employers immediately declined liability.

The average adjustment was dated December 1, 1982. Nothing happened until August 25, 1983, when Pacific Employers, tired of having the claim of about $3,000,000 hanging over it like the Sword of Damocles, filed this action in the Eastern District of Louisiana at New Orleans to have the Court declare that petitioner was not liable for any general average contribution. The jurisdiction of the District Court was invoked pursuant to Title 28, Sections 1332 and 2201 of the United States Code. The complaint in the declaratory judgment proceeding alleged that a general average contribution could not be claimed from cargo interests because there was no sacrifice which could be classified as a general average act, and alternatively that the vessel was unseaworthy when she broke ground on her voyage to the knowledge of her owners and operators, foreclosing such a contribution.

About two months after the declaratory judgment suit had been filed in New Orleans, the U.K. Club filed suit in Antwerp against Pacific Employers for the recovery of the amount found to be due by it in the general average adjustment. The U.K. Club then filed a motion to dismiss the declaratory judgment proceeding in the District Court at

New Orleans on the ground that it was "anticipatory" in nature.

The District Court granted the motion to dismiss, relying on *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983). The U.K. Club attached certain documents to its motion. The Court considered the documents over the objection of Pacific Employers, which took the position that evidence could not be adduced on a motion to dismiss. The U.K. Club claimed and the courts below agreed that the U.K. Club was prejudiced in some fashion by the failure of Pacific Employers to have the summons in this case served contemporaneously with its filing. Overlooked in this connection is the fact that on the same day the suit was filed, a copy of the complaint was mailed to counsel for the U.K. Club. It is understood that counsel immediately forwarded a copy to the Club. No prejudice, therefore, could have been suffered.

The Court of Appeals affirmed, limiting its review to whether the District Court had abused its discretion in dismissing the suit. The usual appellate review was not afforded the litigants.

Relying on *Burt v. Isthmus Development Co.*, 218 F.2d 252 (5th Cir.) *cert. denied* 349 U.S. 922, 75 S.Ct 661 (1955), petitioner additionally urged that it would be improper, under the circumstances here present, to remit petitioner, a California corporation, to the court of a foreign country to have its rights adjudicated.

This writ has been sought in an effort to correct the improper interpretation of the Declaratory Judgment Act, which was enacted for the specific purpose of permitting

litigants to bring their disputes before the courts for adjudication without waiting for the opposing party to seek the more harsh remedy of a coercive action. As was stated by Justices White, Douglas and Stewart, in dissenting from the denial of a writ in *Bailey v. Weinberger*, 419 U.S. 953, 95 S.Ct. 190 (1974):

> It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict here presented.

If this question had arisen in any circuit other than the Fifth or Tenth, every other circuit would have made an independent review of the conclusions and findings of the District Court and would have reversed.

It is submitted that the error is apparent in that every case involving a declaratory judgment has a "flip side" in which the declaratory defendant could have brought a suit for a coercive judgment. Therefore, the concept of "anticipatory" declaratory judgment suits is an erroneous concept, unless it be limited to those circumstances where bad faith on the part of the declaratory plaintiff in order to "steal a march" on the opposing party is apparent on the face of the papers.

It is to bring the rule of the Fifth Circuit into line with the majority of the other circuits that this application for writ is filed. The rule that a review is confined to a determination of clear abuse of discretion is simply wrong because it tends to constrict rather than expand the right to proceed by declaratory process in direct contravention of the intent of Congress to have the Declaratory Judgment Act liberally construed.

REASONS FOR GRANTING THE WRIT

I. The intercircuit conflict as to the standard of review to be accorded a dismissal of a declaratory judgment action should be resolved.

While it is admittedly within the sound discretion of a district court to grant or deny declaratory relief to a party, the discretion of the trial court is not absolute. The exercise of the judicial discretion of the district court is reviewable on appeal. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* §2759 (1983). As hereinafter amplified, the abuse of discretion standard of appellate review in such cases is presently applied by only two courts of appeals, and a more searching standard of appellate review is presently used by six of the remaining twelve circuits.

The Fifth Circuit in its opinion below followed its earlier decision in *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983) and adhered to the abuse of discretion standard. The Tenth Circuit also applies the abuse of discretion standard of review. *See Shannon v. Sequeechi*, 365 F.2d 827, 829 (10th Cir. 1966), *cert. denied* 386 U.S. 481, 87 S.Ct. 1175 (1967); *Duggins v. Hunt*, 323 F.2d 746, 748 (10th Cir. 1963).

An overwhelming majority of the circuit courts, however, have adopted the better rule that a district court's determination of whether to grant or deny declaratory relief is subject to a more searching appellate review than the abuse of discretion standard. Thus, the appellate court can substitute its judgment for that of the lower court. The preferred majority approach is the ac-

cepted standard in the Second Circuit, *see Beacon Construction Co. v. Matco Electric Co.*, 521 F.2d 392 (2d Cir. 1975); the Seventh Circuit, *see Sears, Roebuck and Co. v. American Mut. Liability Ins. Co.*, 372 F.2d 435 (7th Cir. 1967); the Eighth Circuit, *see Alsager v. District Court of Polk City, Iowa*, 518 F.2d 1160 (8th Cir. 1975); the Ninth Circuit, *see Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984); and the District of Columbia Circuit, *see Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976).

In a similar yet slightly more restricted manner, the Third Circuit has also adopted a more searching standard of review than abuse of discretion, but has drawn a distinction between appellate review of the granting of declaratory relief as opposed to the denial of declaratory relief. Because the Declaratory Judgment Act should be liberally interpreted, the Third Circuit has held that the ambit of the district court's discretion is circumscribed, and the range of appellate review is correspondingly enlarged when the district court has *denied* declaratory relief, as in the instant case. *See Interdynamics, Inc. v. Wolf*, 698 F.2d 157, 167, n.10 (3d Cir. 1982).

Hence, when declaratory relief is denied there is a clear intercircuit conflict as to the proper standard of review. Petitioner submits that this Court should grant certiorari in order to bring the circuits into accord and adopt the more expansive majority rule as the proper standard of review.

The Court of Appeals below determined only that the District Judge did not abuse his discretion in dismissing the suit. Not only did the District Judge err, but the Court of Appeals refused to review his decision on appeal.

The concept of the declaratory judgment action creating permissive jurisdiction in the district court may be correct, but the exercise of the authority to refuse to hear a declaratory judgment suit is limited. The Act that creates the remedy provides that a district court *may* declare the rights and relationships of litigants, but the permissive jurisdiction is conditioned on the suit giving complete and final relief being available to the parties in the proceeding, or on it settling an incipient controversy. The relief is alternative or cumulative, not exclusive or extraordinary. Moreover, "[t]he existence of another adequate remedy does not preclude...declaratory relief in cases where it is appropriate."

The foregoing statement is contained in Rule 57 of the Federal Rules of Civil Procedure. It is submitted that Rule 57 was completely ignored by the courts below. The Advisory Committee Note to the Rule, as well as the commentators, agree on this question:

> "[T]he declaratory judgment should not be considered an extraordinary remedy or an unusual or a strange form of action; it should be considered a simple, ordinary auxiliary remedy - no more strange than injunction, specific performance, or damages - to be asked for and given whenever it will remove uncertainty in the rights of a litigant or settle a controversy existing or incipient."

10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d* §2758 (1983) (quoting C. Clark, *Handbook of the Law of Code Pleading* §53 (2d ed. 1947).

The Advisory Committee Note to Rule 57 further states:

> A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

In *Mutual Life Ins. Co. v. Krejci*, 123 F.2d 594, 596-597 (7th Cir. 1941), the court explained that Rule 57

> provides that in an action for declaratory relief the existence of other adequate remedy does not preclude declaratory relief where it is appropriate. This is not an equity suit wherein the existence of an adequate remedy in a court of law may bar the action. It invokes rather a statutory remedy created by Congress, the procedure under which is fixed by the rule quoted.

It is submitted, therefore, that the availability of declaratory relief is not conditioned on extraordinary facts or limited in its use of unusual situations.

> The declaratory judgment is basically a type of relief which it is hoped will further the ever present struggle of making justice more just. It is an added number in a court's repertoire from which to choose the appropriate help for a party. Likewise, the existence of another adequate remedy does not foreclose the use of a declaratory judgment where it is otherwise appropriate.

Doehler Metal Furniture Co. v. Warren, 129 F.2d 43, 45 (D.C. Cir. 1942). Although the *Doehler* court noted that "Not all courts have agreed that this is the better view",

it added that "[s]ince the adoption of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, however, it is definitely the law for the federal courts." 129 F.2d at 45, n.10 (citations omitted).

The test for deciding whether declaratory relief is appropriate is stated in *MacMillan-Bloedel, Inc. v. Firemen's Ins. Co.*, 558 F. Supp. 596, 599 (S.D. Ala. 1983) as:

> The availability of other adequate remedies does not in and of itself...weigh against the rendition of declaratory relief. The test is whether or not the other remedy is more effective or efficient, and hence whether the declaratory action would serve a useful purpose.

This position is consistent with the Advisory Committee Note to Rule 57 that "the fact that another remedy would be equally effective affords no ground for declining declaratory relief."

The courts below completely lost sight of the foregoing. There is no such thing as a single sided controversy. Every controversy, by definition, has at least two parties, each of whom controverts the other's position. The declaratory judgment procedure was adopted for the purpose of permitting a litigant to have a determination made of a controversy without subjecting the party to the potentially harsh result of execution being made on a coercive judgment.

Viewed in the context of the instant case, it is submitted that it is almost impossible to conceive of this being a suit which is "improperly anticipatory".

After the general average statement had been issued on December 1, 1982 (over six years after the pipeline damage had occurred), no action had been filed by the U.K. Club for a recovery of the substantial sum allegedly due from Pacific Employers. The declaratory judgment proceeding was filed eight months later. No forewarning by the U.K. Club had been given, and there had been no indication that it intended to file a suit, nor where such a suit was going to be filed, nor, in fact, had there been any communication between the parties that a suit in Antwerp was contemplated.

It is submitted that Pacific Employers should not be required to continue to wait until the U.K. Club determined if or where it should take action. Finally, on October 31, 1983, two months after the suit had been filed in New Orleans, suit was filed in Antwerp for a recovery of the amount allegedly due in the general average adjustment.

In arriving at its decision to dismiss the suit, the District Court relied on *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983). Therein, the Court of Appeals for the Fifth Circuit dismissed the declaratory action on the ground that it was "anticipatory". In that case, however, as in *Ven-Fuel, Inc. v. Department of Treasury,* 673 F.2d 1194 (11th Cir. 1982), the courts found that the declaratory defendants had been lulled by the plaintiffs into a false sense of security resulting in their not filing coercive actions before the declaratory suits were intitiated. In both cases, the declaratory plaintiffs were guilty of what almost might be defined as sharp practices, for in both cases the declaratory defendants clearly indicated that a suit for a money judgment would be filed and the declaratory plaintiffs violated

their express or implied agreements to do nothing to "jump the gun" and win the race to the venue of their choice.

No such conduct can possibly be attributed to Pacific Employers, but the Court nevertheless ruled as if it had done something morally, if not legally wrong. Your Honors will note that in both *Mission* and *Ven-Fuel*, the declaratory plaintiffs took what the courts considered to be an unfair advantage of the declaratory defendants. The declaratory plaintiffs reached the courthouse first by having improperly induced the declaratory defendants to refrain from filing their suits for executory judgments. This does not mean, however, that the courts should establish a rule that a declaratory action cannot stand on its own feet, even though the declaratory defendant might have a claim that could be reduced to an executory judgment against the declaratory plaintiff.

The District Judge nevertheless remitted the plaintiff below, Pacific Employers, to the Belgian court wherein a suit had been subsequently filed. A full review of the action of the District Court would have disclosed the impropriety of its ruling, whereas the limited review accorded under the "abuse of discretion" standard apparently did not.

If this litigation had been commenced in the Second, Third, Seventh, Eighth, Ninth or District of Columbia Circuits, the result would undoubtedly have been different.

In *Broadview Chemical Corp. v. Loctite Corp.*, 417 F.2d 998 (2d Cir. 1969), a declaratory judgment action was brought in Connecticut wherein Broadview sought to establish that it had not infringed two patents owned by

Loctite. The district court refused to take jurisdiction of the declaratory judgment action, and the appeal followed. In the face of an apparent arguement that the district court's dismissal of the suit was discretionary (which the Second Circuit agreed as a legally sound and proper interpretation of the Declaratory Judgment Act), the *Broadview* court held:

> However, with respect to the exercise of discretion under the Declaratory Judgment Act, as distinguished from other discretionary rulings, "*the appellate court in all cases must exercise its own judgment on the propriety of the refusal or grant*[of a request to entertain a declaratory judgment action] and not rely upon the judgment of the trial court." Borchard, Declaratory Judgments, 294 (2d ed. 1941). Similarly, Professor Moore states that "in reviewing the trial court's exercise of discretion to grant or refuse declaratory relief, a sound position is that the appellate court may substitute its judgment for that of the lower court. The determination of the trial court may, therefore, be reversed where, though not arbitrary or capricious, it was nevetheless erroneous." Moore's Federal Practice (2d ed. 1966), Vol. 6A, 3030. Contrary to Loctite's contention, *we are not persuaded that other cases require or even suggest a more limited standard of review.*

417 F.2d at 1000 (footnoes omitted; emphasis added).

The language of the court in *Hanes Corp. v. Millard, supra,* is particularly apposite:

There is no absolute right to a declaratory judgment in the federal courts. 28 U.S.C. §2201 (1970) states only that those courts "*may* declare the rights and other legal relations of any interested party seeking such declaration" (emphasis added); whether they do so in a particular case is a matter of judicial discretion. The problem in this case is whether that disretion was properly exercised by the District Court in granting the judgment that it did.

It is clear, to begin with, that the grant or denial of declaratory relief by a trial court is subject to review -- indeed a quite searching review -- at the appellate level. All agree that the exercise of discretion must be a "sound" one. See 10C. Wright & A. Miller, Federal Practice and Procedure: Civil §2759 at 784 (1973), and cases cited. A number of courts and commentators take the view that the customary deference observed with respect to certain district court determinations is not applicable in this context, and that an appellate court can, and should, bring its own judgment to bear.

531 F.2d at 59 (citations omitted).

The error into which the courts below fell is explained by the fact that they simply overlooked Rule 57 of the Federal Rules of Civil Procedure. It cannot be made more plain than the words of the Rule, namely, that the "existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." It should always be borne in mind, of course, that there is no reason why a defendant in a declaratory judgment proceeding cannot counterclaim and procure an executory

judgment if he should prevail. In other words, the adversary is not prejudiced by the fact that the suit is initiated by the declaratory plaintiff, except insofar as he may possibly object on the ground that he does not like the forum that has been chosen. In that case, if indicated, Section 1404(a) of Title 28 of the Judicial Code authorizes the court in which the proceeding is pending to transfer it to another federal court for the convenience of the parties, the witnesses, and in the interests of justice.

This the court did not do when it remitted Pacific Employers to the Belgian court.

II. *A United States court should not remit a United States citizen to the uncertainties and inconvenience of litigation in a foreign court in the absence of a finding of unusual or extreme circumstance and manifest injustice.*

Although not denominating this case as one involving the doctrine of *forum non conveniens*, the Court of Appeals nevertheless considered the doctrine and refused to follow the express directive of *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir.) *cert. denied*, 349 U.S. 922, 75 S.Ct. 661 (1955).

In the matter at hand, both litigants are represented by counsel in New Orleans; the occurrence which gave rise to this litigation took place on the Mississippi River near New Orleans; and although neither party is domiciled in Louisiana, it seems quite clear that the convenience of a trial in New Orleans far outweighs any conceivable advantage that could tip the scale in favor of the Antwerp jurisdiction.

The Court will recognize that the voyage out of which this controversy arose terminated at Hamburg, West Germany. No explanation as yet has been forthcoming from the U.K. Club as to why the general average adjustment was assigned by it to Belgian average adjusters, or why the Antwerp forum was chosen by it.

It is submitted that Hamburg is the obvious place where the general average should have been stated in the absence of any proof in the record as to any different contractually agreed upon designation. Such a designation is usually contained in a charter party or bill of lading, but no opportunity was afforded Pacific Employers in this case to introduce evidence as to any port which might have been selected by the parties. It is evident, however, in view of the challenge made by Pacific Employers to the propriety of a general average claim being made against it, that New Orleans is the most convenient place where this litigation could be handled.

Counsel dows not believe it amiss to call the attention of the Court to the difference in procedures followed by European courts generally as compared to our system of the adminstration of justice. It is believed that most European courts, including the courts of Antwerp, do not permit cross examination of witnesses, possibly not even examination by counsel. The courts of most civil law countries seem to rely on narrative statements rather than direct testimony, so that cross examination is not possible. Most important, of course, is the fact that the Belgian proceedings at Antwerp are conducted in Flemish, so that there is a language barrier facing the American witnesses in addition to the distance they would have to travel to testify.

It is anticipated that witnesses from Louisiana who have knowledge of navigation on the Mississippi River generally, and particularly of the incident out of which this litigation arose, will be called to testify. The expense and inconvenience of the Belgian trial is by no means a minor factor in arriving at a proper determination of forum in this case.

In the instant case, no party is interested other than the two litigants. The language of *Burt* is singularly apposite as to the rights of the parties:

> It strikes us being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong.
>
> *We...express the view that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country.* We find no such circumstances or manifest injustice here; and discretion, if it exists, cannot sustain the trial court's action in dismissing the suit.

218 F.2d at 357 (emphasis added).

The *Burt* court pointed out that where a citizen had the option of bringing his action in one of two United States courts, he could be required to bring it in that court which could most conveniently and expeditiously deter-

mine the issues, and that this power had been codified in 28 U.S.C. §1404. In such cases, there had been at least one other forum *in the United States* in which the suit could have been brought, and the "clash was between *United States* courts of concurrent jurisdiction." *Id.* at 357 (emphasis added). But no case has been found in which a resident citizen was dispatched to a foreign court unless there was good reason therefor. Such an action would be foreign to the role played by the federal courts in our Constitutional scheme.

The *Burt* case has been followed on numerous occasions by other courts of appeals. For example, the Third Circuit held that :

> A citizen of the United States may have no absolute right to have his case tried in a federal court but his election of such a forum should not be disregarded in the absence of persuasive evidence that the retention of jurisdiction will result in manifest injustice to the respondent. This is so even though the more convenient court may be the foreign one.

Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir.), *cert. denied* 385 U.S. 945, 87 S.Ct. 318 (1966) (citations omitted); *accord La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983).

The Second Circuit came to the same conclusion and quoted from *Burt* opinion in *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), where Chief Judge Friendly found that although the balance of convenience would be satisfied, indeed favored,

if the parties were remitted to Great Britain for trial, "that is not enough to justify a district court in dismissing the complaint of an American citizen," and refused to require the litigation to be moved from New York to London. *Id.* at 1344.

Contrary to the analysis of the Court below, the significance of the *Burt* decision is not impaired by *Piper Aircraft Co. v. Reyno*, 454, U.S. 235, 102 S.Ct. 252 (1981). The latter case involved an air crash in Scotland, and the real parties at interest were nationals of Scotland, represented by a United States citizen in the litigation. Additionally, it was obvious that there would be major difficulties of procedure involved in the third party demands and the cross claims among the defendants.

It is submitted that the convenience of the parties and the witnesses and the interests of justice require that this controversy be litigated in New Orleans rather than in Antwerp and for this reason alone, the conclusion of the Court of Appeals is erroneous and should be reviewed and reversed.

CONCLUSION

For the foregoing reasons, it is submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. The conflict among the courts of appeals concerning the standard of review of the dismissal of declaratory judgment actions should be resolved in favor of the majority view held by the Second, Third, Seventh, Eighth, Ninth, and District of Columbia Circuits; the abuse of discretion standard utilized by the Fifth and Tenth Circuits is improper and should be abandoned.

Additionally, the principle that a United States citizen should not be denied access to United States courts except in extreme circumstances, where there is positive evidence that there would be manifest injustice to the other party should not be limited to *forum non conveniens* cases but should also apply to this dismissal of the declaratory judgment action.

Finally, even assuming the propriety of the abuse of discretion standard of review and the inapplicability to declaratory actions of the *Burt* principle, the decision below is clearly erroneous and represents a miscarriage of justice requiring reversal by this Court. Accordingly, petitioner respectfully prays that this Court issue a writ of certiorari and review and reverse the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregiong Petition for Writ of Certiorari were served upon counsel of record in this matter by hand-delivery to his office on this _____ day of June, 1985.

APPENDIX A

PACIFIC EMPLOYERS INSURANCE COMPANY, Plaintiff-Appellant,

V.

M/V CAPT. W.D. CARGILL, her engines, tackle, apparel, furniture, etc., in rem, and the United Kingdom Steamship Assurance Association, Ltd., in personam, Defendants-Appellees.

No. 84-3139

United States Court of Appeals,
Fifth Circuit

Feb. 1, 1985

Charles Kohlmeyer, Jr., Patrick Johnson, Jr., Andrew S. deKlerk, New Orleans, La., for plaintiff-appellant.

Donald A. Lindquist, Kenneth J. Servay, New Orleans, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, GARWOOD, and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge:

This is an appeal from the dismissal of a declaratory judgment sought by Pacific Employers Insurance Company (Pacific), the insurer of cargo interests on the M/V CAPTAIN W.D. CARGILL, in anticipation of a subsequently filed suit against Pacific by the United Kingdom Mutual Steam Ship Assurance Association (U.K. Club), the ship's insurer, for a contribution by Pacific on behalf of cargo interests to a general average statement. The M/V CARGILL had caused extensive damage to pipelines in the Mississippi River and its insurer had paid the pipeline owner and contractor for the damage. Pacific sought in the declaratory judgment action to avoid liability for its contribution under the general average statement—the very issue it was to be sued on by the ship's insurer in a Belgian court. Finding no abuse of discretion by the trial court in dismissing the anticipatory action, we affirm.

FACTS

[1-3] In 1976, the M/V CARGILL, while enroute from Baton Rouge, Louisiana, to Hamburg, West Germany, briefly lost power and dropped anchor in the Mississippi River to avoid collision with tugboats there. The ship's action caused extensive damage to pipelines under construction in the Mississippi River bed and the loss of both anchors. Nevertheless, after a short delay, the ship proceeded to its destination. The cargo's insurer, Pacific, executed a general average guarantee, permitting the cargo to be discharged at Hamburg. Under the usual procedure in maritime casualty losses, the insurer of the vessel, U.K. Club, sought a general average statement[1] from the College Van Dispaucheurs in Antwerp, Belgium. The general average statement was issued on December 11, 1982: it valued the cargo at $12,856,66.22 and the vessel at $5,400,000.[2] U.K. Club paid the pipeline owner and contractor for the damage. Under the general average statement Pacific and other cargo interests were to contribute nearly $3 million.

[4] On August 25, 1983, Pacific filed suit and sought a declaratory judgment absolving it of its contribution to

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[1] The principle of general average is that "loss for the common benefit which is incurred by one who partakes in a maritime venture should be shared ratably by all who participate in the venture." *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co,* 274 F.Supp. 884, 891 (D.Md.1967). The ship generally has the duty to declare average, and pending a general average adustment, it has "a lien upon the cargo for such contributory share as, under the facts of the case, the cargo owners might be bound to pay..." *Id.* (citations omitted). As in this case, a general average guarantee if often used to circumvent the inconvenience of liens upon the cargo. *Id.* at 892. The insurer entering into a guarantee stands in the shoes of the cargo owners.

[2] The adjustment of general average is a highly complex matter which usually...requires preparation of a written statement setting forth the intricate computations pursuant to which contributions, said to be owing, are determined. In the context of current maritime complexities, such statements may be a number of years in preparation

Humble Oil, 274 F.Supp. at 892. In the case *sub judice*, the general average statement was issued about six years after the accident.

the general average.[3] It filed the action in the United States District Court for the Eastern District of Louisiana. On October 31, 1983, prior to being served in the United States action, U.K. Club filed a suit[4] seeking to collect the general average contribution from Pacific in Antwerp, Belgium. On December 8, 1983, U.K. Club filed a motion to dismiss the declaratory judgment action alleging that Pacific brought the declaratory judgment action in anticipation of U.K. Club's suit to collect the contribution.[5] The district court, noting that Pacific did not serve U.K. Club with process as to the declaratory judgment action until after U.K. Club had selected a Belgian forum, found Pacific to have brought an anticipatory action and to have abused judicial procedure as to its use of the declaratory judgment action. Pacific has timely appealed from the final judgment dimissing its declaratory judgment action.

ANALYSIS

(1) *Standard of Review*

[5] The review of a district court's decision

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[3] Pacific wishes to contest its contribution on the grounds that the vessel made no sacrifice of a general average nature and that it was unseaworthy when it embarked.

[4] A general average statement without any agreement by the parties otherwise has no legal effect of its own. *Humble Oil*, 274 F.Supp. at 893. Thus, the shipowner may have to bring a legal action to obtain the contribution suggested in a general average statement.

[5] Pacific argues on appeal that it filed the declaratory action to absolve itself "of an enormous possible liability that had remained outstanding for a very long time." Pacific argues that its action was therefore not anticipatory. The district court properly focused on the time frame since the issuance of the general average statement rather than since the casualty in finding the action to be anticipatory. *See supra* note 2 concerning the usual time frame for issuing a general average statement.

whether to provide declarartory judgment relief is limited to the question of whether the district court abused its discretion. *See Mission Insurance Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir.1983). In *Puritan Fashions*, this Court noted that a "district court...is not required to provide declaratory judgment relief, and [that] it is a matter for the district court's sound discretion whether to decide a declaratory judgment action." *Id.*

(2) *Anticipatory Declaratory Judgment*

[6,7] This Court has stated that a proper factor is to consider in dismissing a declaratory judgment suit is whether the suit was filed in anticipation of another and therefore was being used for the purpose of forum-shopping. *Puritan Fashions*, 706 F.2d at 602 & n. 3; *accord Ven-Fuel, Inc. v. Dep't of Treasury*, 673 F.2d 1194, 1195 (11th Cir.1982). The district court based its decision to dismiss on a finding that Pacific's declaratory judgment suit was filed in anticipation of a suit filed *two months* later by U.K. Club in another jurisdiction to collect the general average contribution that Pacific sought to defeat in the declaratory judgment action. The district court was also influenced in its decision by Pacific's unexplained delay in serving the defendant U.K. Club until after the second suit was filed. The court concluded that the delay indicated an abuse of judicial procedure in trying to control the forum of the plaintiff's action. The district court did not abuse its discretion in refusing to hear the declaratory judgment action.

(3) *Forum Non Conveniens*

While the district court's dismissal of the

declaratory judgment action may be affirmed without any consideration of the appropriateness of the forum for the action on the general average to be brought, the court did make reference to the appropriateness of the Belgian forum, and, therefore, Pacific's argument concerning its right to choose a forum for the litigation in question will be addressed.

[8,9] Pacific contends that as a United States citizen it is entitled to litigate its claim in an American court, relying on *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922, 75 S.Ct. 661, 99 L.Ed. 1254 (1955). *Burt* was a *forum non conveniens* case in which this Court made the follwing observation that Pacific would have govern here:

> We...express the view that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising...discretion to deny a citizen access to the courts of this country.

Id. at 357 (dictum). The usual factors to be weighed by a court in a *forum non conveniens* case such as *Burt* include the following:

> [plaintiff's] choice of forum; status of the parties; convenience of parties and witnesses; access to sources of proof; cost of obtaining the attendance of willing witnesses; possibility of a view of the premises, if appropriate, relative advantages and obstacles to a fair trial; and possible difficulty in the application of foreign law.

Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 613 (3d Cir.), *cert. denied*, 385 U.S. 945, 87 S.Ct. 318, 17 L.Ed.2d 225 (1966). A general principle in *forum non conveniens* cases is that

> [a] plaintiff's choice of forum is entitled to great weight and will not be disturbed except upon a clear-cut showing by the defendant that the convenience and justice for all parties demands that the litigation proceed elsewhere.

Argyll Shipping Co. v. Hanover Insurance Co., 297 F.Supp. 125, 129 (S.D.N.Y. 1968) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)).

The dictum in *Burt* quoted above would modify the general rule giving the plaintiff the choice of forum for United States citizens, such that neither plaintiff nor defendant would be denied access to an American forum except in extreme circumstances. In fact, in *Burt*, this Court reversed the discretionary dismissal on *forum non conveniens* grounds of a suit involving a cause of action that arose in Mexico governed by Mexican law, that the defendant wished to be brought in Mexico, but that the plaintiff had filed in Texas, the domicile of the defendant. Both parties to the lawsuit were United States citizens. 218 F.2d at 355, 358.

[10] First, *Burt* is readily distinguishable from the present anticipatory declaratory judgment action as a *forum non conveniens* case. The case *sub judice* was determined primarily on the ground that it was a declaratory judgment action improperly brought in anticipation of another action, and as an abuse of judicial procedure. A

district court's discretion in dismissing declaratory judgment actions is not directly governed by considerations relevant in a suit dismissed under the *forum non conveniens* doctrine. Stated differently, the factors to be considered by the district court in exercising its sound discretion concerning the dismissal fo a declaratory judgment action are not the same factors that are to be considered by a district court in exercising its sound discretion in dismissing a case under the *forum non conveniens* doctrine. Pacific has tried to impose a consideration found appropriate in a *forum non conveniens* case, the United States citizenship of a party, to a declaratory judgment action. The argument is not persuasive in showing that the district court abused its discretion in the case *sub judice.*

[11, 12] Further, even in a *forum non conveniens* case, a federal district court retains its discretion to decline to hear an action by an American citizen when the alternative forum is a foreign court. *See Burt,* 218 F.2d at 357. The Supreme Court has recently weakened even the admonition of *Burt* against depriving a United States citizen of the choice of a home forum in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). There the Court observed:

> A citizen's forum choice should not be given dispositive weight, however...Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

Id. 454 U.S. at 255, n. 23, 102 S.Ct. at 266, n. 23. Thus, despite Pacific's argument that as a United States citizen its choice of a home forum is entitled to greater deference by a United States court than a foreigner's choice, a United States court in a *forum non conveniens* case is not required to make its determination on that factor alone, nor would it have abused its discretion in not heavily weighing that factor.

Finally, Pacific's argument is even further weakened by Pacific's own actual status[6] as an insurer of the cargo owned by foreign interests. The cargo owner is not a United States citizen, and Pacific by entering into the guarantee agreement that permitted the unloading of the cargo in Hamburg stepped into the shoes of the foreign cargo owner. In *Del Monte Corp. v. Everett Steamship Corp.*, 402 F.Supp. 237, 243 (N.D.Ca.1973), Del Monte based its action on the right of a Japanese corporation and it was not treated as a United States citizen suing in its own right. Pacific stands in a similar position in representing the interests of the cargo owners. Therefore, even if the *forum non conveniens* considerations of *Burt* applied to this case, Pacific is not in a position to benefit from any preference given to United States citizens for a home forum.

CONCLUSION

The district court did not abuse its discretion in

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[6] It may be argued also that in its role as insurer of the cargo, Pacific would or should have expected the possibility of answering in a foreign jurisdiction under a general average ruling in the event the vessel was involved in an accident. This argument is not presented as an additional basis for affirming the dismissal, but as a comment on Pacific's reluctance to have the issue of its contribution to the general average heard in the forum where it would most likely be raised.

dismissing the declaratory judgment action as anticipatory. We decline to impose the dictum of *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922, 75 S.Ct. 661, 99 L.Ed. 1254 (1955), on the case *sub judice*. Considerations relevant to a *forum non conveniens* decision are not strictly applicable to this case; however, even if they were to be applied, the dismissal of the action would remain proper given that Pacific stands in the shoes of a foreign cargo owner.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3139

D. C. Docket No. CA-83-4283-M

PACIFIC EMPLOYERS INSURANCE COMPANY,
Plaintiff-Appellant,

versus

M/V CAPT. W.D. CARGILL, her engines,
tackle, apparel, furniture,
etc., in rem, and the United Kingdom
Steamship Assurance Association, Ltd.,
in personam,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before THORNBERRY, GARWOOD, and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

On CONSIDERATION WHEREOF, It is now here

APPENDIX B (continued)

ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court

February 1, 1985

ISSUED AS MANDATE: MAR 25, 1985

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-3139

PACIFIC EMPLOYERS INSURANCE COMPANY,
Plaintiff-Appellant,

versus

M/V CAPT. W.D. CARGIL, Etc., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(March 15, 1985)

Before THORNBERRY, Senior Judge, GARWOOD and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Robert M. Hill

United States Circuit Judge

APPENDIX D

MINUTE ENTRY
BEER, J.
JANUARY 23, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PACIFIC EMPLOYERS INSURANCE COMPANY	CIVIL ACTION
VERSUS	NUMBER 83-4283
M/V CAPTAIN W.D. CARGILL, ETC., ET AL	SECTION M

On November 25, 1976, the M/V CAPTAIN W.D. CARGILL was sailing from Baton Rouge to Hamburg, West Germany. The vessel lost power near St. Gabriel, Louisiana, and dropped anchor to avoid collision. The anchors ostensibly contacted pipelines in the course of construction on the Mississippi River bed, resulting in the loss of both anchors and damage to the pipelines. The M/V CAPTAIN W.D. CARGILL soon regained power and proceeded to its destination.

The vessel owners declared a general average, and retained the Collage Van Dispacheurs at Antwerp, Belgium, to prepare the general average statement. The general average guarantee was executed on December 14, 1976.

On the same day, J. Ray McDermott & Co., Inc. and Big Three Industries, Inc. brought suit in this court against the M/V CAPTAIN W.D. CARGILL and Tradax International, S.A., claiming $4,000,000 for damages to the pipelines. The United Kingdom Mutual Steamship Association, Ltd. - the CARGILL's Protection and Indem-

nity Club - settled the lawsuit for $2,785,217.20 - paid on or about June 28, 1977.

The Collage Van Dispacheurs issued the general average statement on December 1, 1982. The statement valued cargo at $12,856,666.22, and the vessel at $5,400,000. The statement also found that the settlement amount of the pipeline damage suit was a general average expense. Cargo's contribution to the general average was set at $2,785,217.20.

Although the extent of negotiations between the parties was the subject of a minor dispute at hearing, it is apparent that the parties remained in at least periodical contact regarding a settlement of cargo's contribution to the general average.

On August 25, 1983, Pacific Employers Insurance Company - the cargo underwirter - filed this claim for a dclaratory judgment absolving it of contribution to the general average. United Mutual Steamship Association was served through the Louisiana Secretary of State in November (the request to issue summons is dated November 16, 1983; the return date was November 28, 1983). Very significantly, defendant had filed suit in Belgium on October 31, 1983. At oral argument, it was made apparent that the subject of the Belgium proceeding is the same general average as is the subject of this action.

Defendant has moved to dismiss this proceeding, contending that a declaratory judgment action is improperly filed where it is essentially in anticipation of an imminent related proceeding in another forum.

Of course, declaratory judgments are usually, if not always, sought with the prospect of future litigation in mind. The defendant relies on two cases illustrating limits on the use of the procedure.

In *Mission Insurance Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983), Puritan had filed a proof of loss with Mission, its insuror, after the theft of Calvin Klein jeans which Puritan manufactured. Puritan requested an extension of the deadline for filing suit, to investigate a contractual limitations provision in the policy. Mission responded affirmatively on December 22, 1981, then promised, on February 5, 1982, an extension of thirty days running from the date Mission should provide its position statement. Mission never provided such a statement, and on March 24, 1982, Mission both orally rejected the claim and filed a declaratory judgment action in the Western District of Texas. On April 16, Puritan brought suit in a California state court. The Western District of Texas dismissed, on the grounds that Mission had intentionally led Puritan to delay filing suit by its misrepresentations, then had filed the declaratory judgment action to effectuate its choice of forum. 706 F.2d, at 601. The Fifth Circuit affirmed.

In *Ven-Fuel, Inc. v. Department of the Treasury*, 673 F.2d 1194 (11th Cir. 1982), the Treasury had threatened Ven-Fuel with judicial proceedings in attempting to collect an unpaid penalty. The day after the notice, Ven-Fuel filed a declaratory judgment action in the Southern District of Florida, arguing that a former criminal proceeding against it barred relitigation of the tax penalty. The District Court dismissed the action with prejudice, where it appeared that Ven-Fuel had filed the suit in anticipation of the Govern-

ment's action filed one week later in the District of Massachusetts. "Ven-Fuel has not argued that is is unable to raise its claim of collateral estoppel before the Massachusetts District Court." 673 F.2d, at 1195. The Eleventh Circuit affirmed the district court's exercise of its discretion.

Without in any way imputing to Pacific Employers the fraud involved in *Mission, supra*, I conclude that this declaratory action was brought largely or primarily to effectuate the plaintiff's choice of forum, in an action which it considered imminent. The proper time frame in judging this matter is the period since the issuance of the general average statement in December, 1982, rather than the period since the casualty itself. Judged from this vantage point, it is a reasonable, though not inescapable conclusion that Pacific Employers has tried to hedge. No other explanation for its delay in serving defendant is acceptable. Perhaps the plaintiff would have succeeded in its forum selection, had it effected immediate service. The delay until after the filing of the Belgium proceeding tips the balance, as a matter of common sense, in favor of a finding of abuse of the procedure.

Pacific Employers has argued forcefully that the pipeline damage is not properly a general average item; that the casualty was possibly not of a general average nature at all; and that it had no opportunity to present its position to the average adjuster. Although there is every reason to assume that the Belgium forum will afford a hearing on these matters, I note at any rate that the contentions are subsidiary to the general equitable question presently at issue - whether the declaratory judgment action has been misused. *See Ven-Fuel, supra* at 1195. The

opportunity to air one's contentions in the other forum is a relevant consideration, but not dispositive, especially where Pacific Employers offered no affirmative evidence that it will be denied consideration of its position in Belgium.

The motion to dismiss is granted.

/s/ Peter Beer

COUNSEL OF RECORD

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PACIFIC EMPLOYERS	*	CIVIL ACTION
INSURANCE COMPANY	*	NUMBER 83-4283
versus	*	SECTION M
M/V CAPTAIN W.D.	*	
CARGILL, ETC., et al.	*	

* * * * * * * * * * *

FINAL JUDGMENT

In conformance with the Court's order of January 23, 1984, issued with written reasons, granting the Motion of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited to dismiss this declaratory judgment action, final judgment is hereby granted in favor of defendant United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, dismissing this action, each party to bear their own costs.

FEB. 17th, 1984

/s/ Peter Beer
UNITED STATES DISTRICT JUDGE

Respectfully submitted,
CHAFFE, McCALL, PHILLIPS, TOLER & SARPY

By: /s/ Donald A. Lindquist
/s/ Kenneth J. Servay

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OPPOSITION

BRIEF

Office-Supreme Court, U.S.
FILED
JUL 29 1985
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-1928

In the Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner,

V.

M/V CAPT. W.D. CARGILL, her engines, tackle, apparel, furniture, etc., *in rem*, and THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION, LTD., *in personam*,
Respondents

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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40 pp

QUESTION PRESENTED FOR REVIEW

Respondent, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, disagrees with the Petitioner concerning the questions presented for review. Rather than the four issues listed by Petitioner, the sole question presented is as follows:

> Whether the district court correctly dismissed the anticipatory declaratory judgment action brought by Petitioner, Pacific Employers Insurance Company, and whether the United States Court of Appeals for the Fifth Circuit correctly sustained this dismissal.

STATEMENT OF INTERESTED PARTIES

Respondent, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, disagrees with the Statement of Interested Parties listed by Petitioner insofar as it lists the M/V W.D. CARGILL as an interested party to these proceedings. Although the M/V CAPT. W.D. CARGILL is the vessel involved in the underlying casualty giving rise to this litigation and is named as defendant in the complaint filed with the district court and in the Petition filed with this Court, that vessel has never been properly brought into this litigation as an *in rem* party as required by Rule C of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims. Additionally, no party has been sued or served *in personam* as the owners of the M/V CAPT. W.D. CARGILL.

The only party properly before this Court and the courts below as a respondent is the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, which has no parent companies or subsidiaries within the scope of Supreme Court Rule 28.1.

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cert. denied, 454 U.S. 1128 (1981) 18

Piper Aircarft Co. v. Reyno,
454 U.S. 235, 102 S.Ct. 252,
70 L.Ed.2d 419 (1981) 17

Sun Oil Co. v. Transcontinental
Gas Pipe Line Corp.,
108 F.Supp. 280, 283 (E.D. Pa. 1952),
affirmed, 203 F.2d 957 (3rd Cir. 1953) 11

Twin City Federal Savings and Loan
Association v. Gelhar,
525 F.Supp. 802, 804 (D. Minn. 1981),
affirmed, 681 F.2d 528 (8th Cir. 1981) 11

Ven-Fuel Inc. v. Department of the Treasury,
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STATUTES AND COURT RULES:

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OTHER AUTHORITIES

10A A. Wright, A. Miller, and M. Kane,
Federal Practice and Procedure
§§ 2759, 2760 (2d ed. 1983) 9, 11, 12

G. Gilmore & C. Black, *The Law of Admiralty*,
(2d ed. 1975) 3, 14, 16

6A J. Moore, J. Lucas, and G. Grotheer, Jr.,
Moore's Federal Practice
¶ 57.08 [5] (2d ed. 1984) 12

NO. 84-1928
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner,

V.

M/V CAPT. W.D. CARGILL, her engines, tackle, apparel, furniture, etc., *in rem*, and
THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION, LTD., *in personam*,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DECISIONS BELOW

In addition to the decisions noted by Petitioner in its statement concerning decisions below, the oral reasons assigned by the district court at the February 15, 1984, hearing on the Motion for Rehearing filed by Petitioner are important to the disposition of this Petition. Respondent, therefore, has annexed as Appendix A the complete transcription of that proceeding.

STATEMENT OF THE CASE

As Petitioner correctly states in its statement of the case, this application for a writ of certiorari presents "no

earth shaking constitutional issue." Petition, 3. Contrary to Petitioner's assertion, this case also presents no issue involving a conflict in the circuits or any other important issues requiring intervention by this Court. Rather, this is simply a case where the district court properly dismissed a declaratory judgment action brought by Petitioner, an insurer who would normally be aligned as a defendant, seeking a determination of liability or non-liability to Respondent, a party who would normally be aligned as a Plaintiff, in hopes of choosing the forum in which the dispute would be resolved. The Fifth Circuit, in accordance with other cases in which similar circumstances were presented, correctly affirmed, finding that anticipatory proceedings, such as the one filed by Petitioner, were an improper use of the declaratory judgment procedure. There is no issue, constitutional, statutory, or otherwise, warranting the grant of a writ in this case.

On November 26, 1976, the M/V CAPT. W.D. CARGILL, laden a cargo of soybeans and soybean meal, left the Port of Baton Rouge, Louisiana, destined for Hamburg, Germany. While proceeding down the river near St. Gabriel, Louisiana, a short distance from pipelines being constructed along the bottom of the Mississippi River, the vessel suddenly, without warning, lost all power. To keep from colliding with nearby tugboats, the pilot of the CARGILL ordered her anchors dropped. While the pilot's actions were successful in avoiding a collision, they also resulted in the loss of both the ship's anchors and substantial damage to the pipeline.

After a minor delay, the vessel completed her voyage to West Germany. The owners of the CARGILL, as a result

of the incident, declared a general average[1] and appointed Collage Van Dispacheurs of Antwerp as the general average adjusters. A General Average Guarantee was filed by Pacific Employers with the average adjuster in Antwerp so that the cargo could be released (a copy of the Guarantee is attached as Appendix "B").

The General Average Adjusters issued their report on December 1, 1982. On August 25, 1983, Pacific Employers filed this declaratory judgment action, however service of process was not attempted at that time. Instead, counsel for Pacific Employers sent a copy of the complaint to respondent's counsel.

On October 31, 1983, United Kingdom filed suit on the General Average Guarantee in Antwerp. On November 16, 1983, Pacific Employers first initiated service on United Kingdom.

Respondent United Kingdom filed its motion to dismiss this declaratory judgment action on December 8, 1983. The district court granted United Kingdom's motion finding that the declaratory judgment action "was brought largely or primarily to effectuate the plaintiff's choice of forum, in an action which it considered imminent."

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[1] General Average is defined in Gilmore and Black, *The Law of Admiralty* (2d ed. 1975) at p. 80, and is discussed fully at p. 244 ff. Basically, when a loss is sustained by one of the parties to the voyage (i.e. the shipowner or the cargo owners) to save the remainder of the property involved in the undertaking, all of the parties to the undertaking must share the responsibility for the loss in the proportion of the value of each party's property to the value of all of the property involved in the undertaking combined. For a general discussion of the law of general average, see the decision of the Fifth Circuit in this case. *Pacific Employers Inc. Co. v. M/V CAPT. W.D. CARGILL*, 751 F.2d at 801, 803 n. 1 and n. 2. (5th Cir. 1985).

(Petitioners' Appendix D, A-17). The court noted that "No other explanation for its delay in serving defendant is acceptable." (Id.). The Court concluded that Pacific Employers offered no affirmative evidence that fair consideration of its position would not be afforded by the court in Belgium (Id., A-17, 18).

On rehearing before the district court, counsel for Pacific Employers claimed that he delayed in serving the complaint because he was attempting to negotiate a settlement with counsel for United Kingdom. However, the district court made clear that in rendering its decision, it considered all relevant circumstances, not just the delay in serving the complaint, which was merely one factor considered. (Appendix A, 2-3):

MR. KOHLMEYER:

...Your Honor seems to have said there was a slight weighing in whether to take or leave jurisdiction that you found we were wanting on our side because of the late service of process and in this context, though, if the Court please, the service of process isn't really the motivating factor. Its the notice of the filing of suit.

THE COURT:

Let me just mention this to you, since you all have made such an issue of that. I don't consider it to be the notice or the service necesarily. I consider it to be the whole ball of wax in the sense that I'm trying to decide as fairly as I can what is going on here as it has to do with the general average procedures in Belgium and what I finally

decided was going on was that everybody was hedging their bet a little bit and that you all weren't any different than the other folks involved, everybody hedging and nobody wants to go in a foreign court if they think they are not going to do as well as in here. Everybody is kind of holding back trying to see how things were going to come out and when it began slipping away a little bit you all made one move. I don't quarrel with that all. I'm just saying that all of that indicates that you were doing a certain amount of, if not form [sic] shopping, at least form [sic] reserving and that is okay but my ultimate determination was it's okay but in this particular instance you kind of stuck with the general average proceedings over in Belgium.

In upholding the dismissal, the district court further noted that it rejected Pacific Employers' argument that it was improper to remit it, an American insurance company, to a foreign court. In this regard, the district court noted that Pacific Employers was a worldwide insurer "that is as at home in Belgium as it is in New Orleans...," not "some poor walking around guy from Sycamore Street..." (Appendix A, 7).

In essence, the district court found that Pacific Employers improperly filed the declaratory judgment action in anticipation of formal legal proceedings to be filed in Belgium, where the general average guarantee had been posted by Pacific Employers to obtain discharge of the cargo. In light of the guarantee and general average statement, which assessed cargo's share of the General Average contribution as over $2.785 million, Pacific Employers

knew that the cargo claim was being asserted against it.[2]

SUMMARY OF ARGUMENT

Pacific Employers argues that this court should grant a writ of certiorari to review the decision of the Fifth Circuit affirming the dismissal of its declaratory judgment action because the Fifth Circuit reviewed the lower court's dismissal under a less stringent standard than used by some of the other circuits. Pacific Employers' argument is without merit and provides no basis for granting a writ of certiorari. Initially, the issue presented herein is not the general standard used by courts of appeal in evaluating the propriety of declaratory judgment actions. Rather the issue is whether the court of appeals properly affirmed the dismissal of this declaratory judgment action where the relevant procedural facts clearly indicated that the action was an anticipatory attempt by a party, who would normally be aligned as a defendant, to choose the forum and obtain an advance declaration of non-liability. The vast majority of courts addressing the issue have found that such anticipatory declaratory judgment actions are an improper use of the declaratory judgment procedure, and that such actions should be stayed or dismissed. Additionally, the dismissal was proper because it is an improper use of the declaratory judgment procedure for an insurer to seek a declaration of non-liability against an aggreived party. Thus, while there is no real difference in the standards of review used by the various circuits, under any statement of the appropriate standard, this declaratory judgment action was properly dismissed. Grant of a writ of certiorari is in-

[2] See the district court opinion, Petitioner's Appendix D, as well as the oral reasons for judgment given by the district judge at the February 15, 1984, hearing (Appendix A, herein).

appropriate in this case because the district court's dismissal and the Fifth Circuit's affirmance is in conformance (rather than at variance) with the jurisprudence of other courts which have considered the issue presented.

Finally, Pacific Employers argues that the district court and the Fifth Circuit erred in "remitting" it, an American insurer to a foreign forum, contrary to the Fifth Circuit's decision in *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955). Initially, Petitioner's argument that a circuit court erred in applying *its own* jurisprudence is outside the scope of matters appropriate for review on a petition for writ of certiorari. Additionally, *Burt*, a forum non conveniens case not involving a declaratory judgment action, is inapplicable herein. Even in the forum non conveniens context, *Burt*, and its progeny have been severely weakened. Finally, as Pacific Employers as cargo insurer stands in the shoes of the European cargo owner, there is no remission of a true American plaintiff to a foreign forum.

In summary, there is no conflict among the circuits regarding the issues involved in this case. Petitioner's request for a writ of certiorari should be denied.

REASONS FOR REFUSING THE WRIT

I.

The District Court Correctly Dismissed and the Fifth Circuit Correctly Affirmed The Dismisal Of This Improper, Anticipatory Declaratory Judgment Action: This Case Involves No Review Of An "Intercircuit Conflict" Justifying Issuance Of A Writ

Pacific Employers would have the Court believe that there is an "intercircuit conflict" concerning the appellate standard of review of the exercise of discretion in granting or denying declaratory judgment relief, and that it was prejudiced because the Fifth Circuit standard is not as searching as the standard used in some of the other circuits. In

reality, this case involves no "intercircuit conflict."[3] It involves an action by an insurance company seeking a declaration of non-liability as to a maritime general average claim. In essence, this case is an international maritime matter in which Pacific Employers, who would normally be aligned as a defendant, filed this delcaratory judgment action in the United States in anticipation that a foreign suit would be filed by Respondent, in hopes of choosing a United States forum and depriving Respondent of its choice of forum. The Fifth Circuit, in accordance with the overwhelming weight of authority, properly affirmed the district court's dismissal.

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[3] Contrary to the argument presented by petitioner, there is no real disagreement among the circuits as to the scope of review given to the exercise of discretion of district courts in allowing or dismissing declaratory judgment actions. While some circuits may state the standard used slightly differently, as evidenced by the caselaw cited by petitioner, all circuits, including the Fifth Circuit, require that the district court exercise "sound judicial discretion," and all agree that this discretion is reviewable on appeal. *See* C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure* § 2759 at 654-58 (West 1983).

Also, contrary to Petitioner's argument, Fed. R. Civ. P. 57 does not have any special bearing on this case entitling Petitioner to a declaratory judgment. There is nothing in that rule prohibiting the dismissal of improperly filed, anticipatory declaratory judgment actions, as is indicated by the many courts which have dismissed such actions. *See* citations at pp.10-12, *infra*.

A. *Anticipatory Declaratory Judgment Actions Seeking to Deprive A Claimant of Its Right to Choose Its Forum Are Disfavored and Should Be Dismissed*

Regarding the principal issue involved in this case, whether anticipatory declaratory judgment actions should be dismissed, the Fifth Circuit held in this case:

> This Court has stated that a proper factor to consider in dismissing a declaratory judgment suit is whether the suit was filed in anticipation of another and therefore was being used for the purpose of forum-shopping.

Pacific Employers Insurance Co. v. M/V CAPT. W.D. CARGILL, 751 F.2d 801, 804 (5th Cir. 1985). This statement of the law is in accordance with past Fifth Circuit cases and with the jurisprudence of other courts which have addressed the issue. It is a recognition of the fact that the declaratory judgment action was not intended as a means for parties properly aligned as *defendants*, to file suit in the forum of their choice, depriving parties properly aligned as plaintiffs of their choice of forum. *See Mission Insurance Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983) (district court acted within its discretion in dismissing declaratory judgment action considering the anticipatory nature of the action); *Amerada Petroleum Corp. v. Marshall*, 381 F.2d 661 (5th Cir. 1967) *cert. denied*, 389 U.S. 1039 (1968) (district court, in exercise of its discretion as set forth by jurisprudence of this Court, properly dismissed declaratory judgment action filed in anticipation of suit by party properly aligned as plaintiff); *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976) (circuit court, reexamining district court's dismissal of declaratory judgment

action, found dismissal proper noting that "anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure [as it] deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse"); *Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321 (4th Cir. 1937) (appellate court found that district court properly exercised its discretion in dismissing declaratory judgment action brought by insurance company seeking to try the validity of defenses it was asserting in a suit filed against insurance company by its insured); *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165 (7th Cir.), *cert. denied*, 395 U.S. 959 (1969) (district court properly dismissed declaratory judgment action brought by potential tort defendant against potential plaintiffs; court noted that Fed.R.Civ.P. 57 was no barrier to dismissal); *Ven-Fuel v. Department of the Treasury*, 673 F.2d 1194 (11th Cir. 1982) (district court found to have properly dismissed declaratory judgment action brought by taxpayer in anticipation of proceeding against taxpayer to be brought by the Government); *see also Twin City Federal Savings and Loan Association v. Gelhar*, 525 F.Supp. 802, 804 (D. Minn. 1981), *affirmed*, 681 F.2d 528 (8th Cir. 1982) ("Where declaratory relief is sought to anticipate the trial of an issue in a court of coordinate jurisdiction, the court's discretion to entertain the action should not be exercised"); *Sun Oil co. v. Transcontinental Gas Pipe Line Corp.*, 108 F.Supp. 280, 283 (E.D. Pa. 1952), *affirmed*, 203 F.2d 957 (3rd Cir. 1953) (Prospective defendant should not be allowed to use declaratory judgment action to choose a convenient forum); C. Wright, A. Miller and M. Kane, 10A *Federal Practice and Procedure* § 2759 at 651 and n. 12 (West 1983) ("The courts properly decline relief if the declaratory judgment procedure, and the federal forum, is being used for 'procedural fencing' or 'in a race for res

judicata); 6A *Moore's Federal Practice* ¶57.08[5] (Mathew Bender, 1984) ("Procedural Fencing" and "race for res judicata" not within purpose of declaratory judgment procedure).

Additionally, actions by an insurer, like the present one, seeking a declaration of non-liability on a claimant's cause of action, are not within the scope of the declaratory judgment procedure. Wright, Miller & Kane, 10A *Federal Practice and Procedure* § 2760 notes:

> A distinction should be noted in the liability insurance cases. It frequently will be useful to have a declaration whether an accident is governed by a policy and whether the insurer is thus obligated to defend a tort action against its insured. The issues of coverage commonly cannot be litigated in the tort action and thus two suits will be necessary in any event. Unless the insured is willing to allow the insurer to defend under a reservation of rights, the insurer, in most states, either must surrender its contractual right and duty to defend the insured or must abandon its policy defenses.
>
> *It is very different if the insurer does not deny that if its insured is liable, the insurer must pay, and instead seeks only a declaration that the insured is not liable to the injured person. Here the declaration serves no useful purpose and is only a procedural attempt, which the courts ought to rebuff, to litigate the claim against the insured in a forum of the insurer's choice.*

Id., § 2760 at 665 (emphasis supplied).

As the discussion, below, indicates, the declaratory judgment action filed by Pacific Employers was properly

dismissed. The procedural facts of this case more than justify the finding by the district court, affirmed by the Fifth Circuit, that this case was an improper attempt to use the declaratory judgment procedure.

B. The Procedural Facts of This Case Support the Dismissal of This Action by the District Court and the Affirmance of the Fifth Circuit

Understandably, Pacific Employers, in its petition to this Court, ignores the procedural facts found by the district court and affirmed by the Fifth Circuit, which clearly show the anticipatory nature of this declaratory judgment proceeding. Instead, Pacific Employers focuses its argument on the alleged different standard of appellate review of declaratory judgment dismissals, arguing that had the Fifth Circuit given the district court's judgment the more searching review allegedly demanded by the law of some of the other circuits, this action would never have been dismissed.[4]

Pacific Employers' argument is without merit. As the above cited authority attests, the courts and commentators agree that anticipatory actions are disfavored. There is more than adequate support in the record of this case justifying the dismissal.

Initially, Pacific Employers, from a time shortly after the casualty, had notice that a general average claim was being brought against it. Shortly after the casualty, to

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[4] See p.8 n. 3, *supra*. There is no real difference in the scope of review afforded by the circuit courts regarding the exercise of discretion review by district courts in allowing or dismissing declaratory judgment actions.

secure the release of the cargo, *Pacific Employers*, through its authorized agent, *posted a general average guarantee with the appointed general average adjuster in Antwerp, Belgium.* As is customary in the maritime business, the case was dormant while the average adjuster evaluated the claim. Several years later,[5] the report of the General Average Adjuster was released, assessing Pacific Employers' share of the General Average Expense at over $2.7 million. There is no dispute regarding the fact that Pacific Employers received the report shortly after its release on December 1, 1982, and that it denied responsibility for the claim within a month after receiving the report.

This action was filed on August 25, 1983. However, Pacific Employers did not attempt to exercise service of process at that time. Instead, counsel for Pacific Employers sent the complaint to undersigned counsel, withholding service, apparently seeking to use the filed, unserved suit as a device to induce settlement (See letters of counsel, attached as Appendix C, which were filed into the district court record). United Kingdom, after settlement negotiations bogged down, filed suit in Antwerp in

[5] The Fifth Circuit, in its decision in this case, correctly noted that the adjustment of general average is a complex matter which often requires a number of years to prepare. 751 F.2d at 803 n.2. The statement of the general average adjuster has no legal effect, thus the shipowner may have to bring suit to obtain the contribution suggested in the statement. 751 F.2d at 804 n. 4. The proper time frame in considering the timeliness of a general average claim begins at the time the general average statement is issued. 751 F.2d at 804 n. 5. In light of the highly respected reputation of general average adjusters in the maritime community for being impartial, and the fact that most claims are settled in conformance with the report of the general average adjuster without resort to litigation, *see* G. Gilmore & C. Black, *The Law of Admiralty*, §§ 5-3, 5-4 (2d ed. 1975), it would have been most unconventional for suit to be filed before issuance of the general average statement.

October 1983 to keep the Belgian statute of limitations from running. Only after suit was filed by United Kingdom in Antwerp did Pacific Employers attempt service of process. Service was finally initiated mid-November 1983.

These facts clearly support the exercise of discretion by the district court in dismissing this action. The facts before the district court support the finding that Pacific Employers, knowing that a $2.7 million claim would be brought against it, filed suit in the Eastern District of Louisiana, hoping to avoid litigating the issue in a forum of United Kingdom's choice. The dismissal is further justified by the manner in which the suit was used. Instead of effecting service of process on Respondent at the time the suit was filed, Pacific Employers withheld service and used the suit as an apparent coercive tool in its commencement of negotiations with United Kingdom's counsel. In reviewing the exercise of the district court's discretion, the Fifth Circuit took into account the same factors considered by the district court and found that the district court's dismissal was proper. *Pacific Employers* 751 F.2d at 804.

Both the consideration given this matter by the district court and the review given the district court's decision by the Fifth Circuit are in accordance with well established jurisprudence. The facts of this case were appropriately considered by both the district court and circuit court. The dismissal of this anticipatory declaratory judgment action is in accordance with the law. Pacific Employers' petition for a writ of certiorari should be denied.

II

The District Court and the Fifth Circuit Did Not Improperly "Remit" A United States Citizen To A Foreign Court

Pacific Employers argues that the lower courts, contrary to the "directive" of the Fifth Circuit in *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955), improperly "remitted" it to a foreign court. In the course of its argument, it argues that the convenience of the parties is in New Orleans,[6] that the general average should have been stated in Hamburg,[7] that the procedures in Belgian courts are different than those in the United States,[8] and that is unfair to remit it to a foreign tribunal to resolve this dispute.

Petitioner presents no argument warranting the grant of a writ of certiorari. Significantly, Pacific Employer's argument presents no conflict between the Fifth Circuit and other circuits nor does it present any other important matter requiring review by this Court. Petitioner merely argues that the Fifth Circuit erred in in-

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[6] This argument was considered and rejected by the Fifth Circuit. While the convenience of the parties plays some minor part in evaluating whether a declaratory judgment action should be maintained or dismissed, the "district court's discretion in dismissing declaratory judgment actions is not directly governed by considerations relevant in a suit dismissed under the *forum non conveniens* doctrine." 751 F.2d at 805. Other considerations, such as whether the action is filed in anticipation of another suit (as in the present case) are more important. *Id.*

[7] As general average adjusters are specialists in their field, and are normally engaged by the insurer of the vessel, Gilmore & Black § 5-3, it is common for the general average to be stated at the location of the average adjuster's office, which often is not the same city as the port of cargo discharge.

[8] Petitioner, in the two district court hearings, presented no evidence before the courts below that it would be treated unfairly before the Belgian court. This issue is improperly raised before this Court.

correctly applying *its own* jurisprudence to the facts of this case.

Even so, review of the Fifth Circuit's opinion indicates that petitioner's argument is without merit. Initially, as the Fifth Circuit noted, *Burt* is a forum non conveniens case, while the present case is a declaratory judgment case involving other factors in addition to the convenience of the parties, such as, in this case, whether the declaratory judgment action was improperly brought in anticipation of another action to be filed. *Pacific Employers*, 751 F.2d at 805. Thus *Burt* is not controlling in this case.

Second, even if this case were a *forum non conveniens* case involving an American citizen, properly aligned as a plaintiff, the district court would still have the discretion to decline to hear the case, even if the result were that an American citizen is required to bring this action in a foreign forum. *Id.*, *citing Burt*, 218 F.2d at 357 and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). In *Piper*, this Court noted:

> A citizen's forum choice should not be given dispositive weight, however...citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggest that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

Id., 454 U.S. at 255, n.23 *as quoted in Pacific Employers*, 751 F.2d at 805.

In addition to this Court and the Fifth Circuit, many

other appellate courts have agreed that a domestic plaintiff's choice of his home forum does not necessarily mean that the case should not be dismissed. *See Pain v. United Technologies Corp.*, 637 F.2d 775, 795-99 (D.C. Cir. 1980) *cert. denied*, 454 U.S. 1128(1981); *Overseas National Airways, Inc. v. Cargolux Airlines International, S.A.*, 712 F.2d 11, 13-14 (2d Cir. 1983); *Alcoa Steamship Co., Inc. v. M/V NORDIC REGENT*, 654 F.2d 147, 154-58 (2d Cir. 1981); *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.) *cert. denied* 104 S.Ct. 549, 78 L.Ed. 2d 723 (1983); *Mizokami Bros. of Arizona, Inc. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977), *cert. denied* 434 U.S. 1035 (1978).

Finally, this is not a pure and simple case of an American citizen being denied a right to file a claim in a United States court, as Pacific Employers would have the Court believe. Pacific Employers is a world-wide insurer of cargo (Appendix A, 8). It insured cargo owned by a foreign receiver. As such, it can and should be expected to defend claims for which it provides coverage such as the present claim, wherever they are brought. The district court recognized this fact in its comments during the hearing on the Motion for Rehearing filed by Petitioner in the district court. *See* Appendix A, 7.

Furthermore, as the Fifth Circuit properly recognized, Pacific Employers, as the insurer of cargo owned by foreign interests, stepped into the shoes of a foreign cargo owner. *Pacific Employers*, 751 F.2d at 806. Pacific Employers posted security in Antwerp in order to have the cargo owned by its foreign principal released. Pacific Employers, therefore does not truly stand in the shoes of the American citizen noted in *Burt*, even assuming that

Burt would prevent a suit brought by a true American entity from being dismissed.

In summary, the actions of the district court and the Fifth Circuit in rejecting Pacific Employers' argument are in accordance with the jurisprudence of this Court and the overwhelming majority of courts which have considered this issue. Additionally, the decisions of the district court and the Fifth Circuit are supported by sound policy considerations. Accordingly, there are no matters presented by Pacific Employers' argument warranting the grant of a writ of certiorari.

CONCLUSION

The decision of the district court dismissing this declaratory judgment action is within the discretion afforded the district court by the Declaratory Judgment Act (28 U.S.C. § 2201), Fed.R.Civ.P. 57 and the interpreting jurisprudence of this Court and other federal courts. Contrary to the argument of petitioner, the Fifth Circuit, in accordance with the jurisprudence of all circuit courts which have reviewed similar fact situations, properly reviewed the circumstances under which this declaratory judgment was brought and agreed with the district court's reasons for dismissing this action. In accordance with the jurisprudence, the district court and Fifth Circuit properly rejected petitioner's argument that Pacific Employers' status as an American corporation prevented the district court from dismissing this action.

In summary, the district court properly dismissed this action and the Fifth Circuit, in affirming the dismissal, completely and adequately reviewed the district court's

decision as required by law. This action presents no issue warranting the grant of a Writ of Certiorari. Respondent, United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd., therefore respectfully prays that Pacific Employers' petition for a Writ of Certiorari be denied.

Respectfully submitted,

DONALD A. LINDQUIST

KENNETH J. SERVAY

OF

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone (504) 568-1320

CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing Petition has been served on all parties by United States mail, first class, postage prepaid, this _____ day of July, 1985.

Respectfully submitted,

DONALD A. LINDQUIST

KENNETH J. SERVAY

OF

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

PACIFIC EMPLOYERS
INSURANCE COMPANY

VERSUS

CIVIL ACTION
NUMBER 4283

THE M/V CAPTAIN
W.D. CARGILL, ET AL

MOTION FOR REHEARING

The above-entitled matter came up for hearing on Wednesday, February 15, 1984, before the HONORABLE PETER BEER, United States District Judge, in the United States Courthouse, 500 Camp Street, New Orleans, Louisiana.

APPEARANCES:

Charles Kohlmeyer Jr.
Suite 2100, Pan American Life Center
601 Poydras
New Orleans, Louisiana 70130

Kenneth J. Servay
Chaffe McCall, Toler and Sarpy
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New Orleans, Louisiana 70112

Reported By:

Rhonda Ballard, CSR
Official Court Reporter

PROCEEDINGS

THE COURT:

This is the argument on the rehearing which I'm basically disinclined to grant but let me ask you to be very brief in connection with the contentions. I should say that I feel like the matter was very fully aired and certainly very seriously considered as far as this Court is concerned. I realize there is a certain frustration in not having the courts adopt a vigorously made contention but I have tried to think this thing through carefully.

MR. KOHLMEYER:

If the Court please, I am disappointed that Your Honor has seemed to have prejudged the matter before argument. I hope that you might listen to the problems as we see them that were not considered.

THE COURT:

Go right ahead.

MR. KOHLMEYER:

The first one is, Your Honor seems to have said there was a slight weighing in whether to take or leave jurisdiction that you found we were wanting on our side because of the late service of process and in this context though, if the Court please, the service or process isn't really the motivating factor. It's the notice of the filing of the suit.

THE COURT:

Let me just mention this to you, since you all have made such an issue of that. I don't consider it to be the notice or the service necessarily. I consider it to be the whole ball of wax in the sense that I'm trying to decide as

fairly as I can what is going on here as it has to do with the general average procedures in Belgium and what I finally decided was going on was that everybody was hedging their bet a little bit and that you all weren't any different than the other folks involved, everybody hedging and nobody wants to go in a foreign court if they think they are not going to do as well as in here. Everybody is kind of holding back trying to see how things were going to come out and when it began slipping away a little bit you all made one move. It slipped away some more and you made another move. I don't quarrel with that all. I'm just saying that all of that indicates that you were doing a certain amount of, if not form [sic] shopping, at least form [sic] reserving and that is okay but my ultimate determination was it's okay but in this particular instance you kind of stuck with the general average proceedings over in Belgum.

MR. KOHLMEYER:

If the Court, please, we weren't hedging at all. We had nothing to hedge. There was nothing against us. Except the general average statement where we were tagged with a claim against us.

THE COURT:

That is pretty substantial, wouldn't you say?

MR. KOHLMEYER:

It was nine months old, nothing had been done other than to have that claim sitting in limbo. Your Honor, isn't that far removed from the practice of law to know an insurance company sets up a reserve against a claim.

THE COURT:

I can see what precipitated that.

MR. KOHLMEYER:

They wanted to reserve all fair boats [sic] or else they wanted to cover one of the two. Every declaratory judgment suit has a coercer's suit on the opposite side of it and there is bound to be a case or controversy; otherwise, it's not a declaratory judgment action at all. It's an advisory opinion which Your Honor would have no right to render. But we have here a completely unsolicited unforced action to get something on the road. We did not know that they were going to make a claim against us other than the fact that some day sooner or later at their convenience they might come in to any court in the world and seek to get a judgment against us. We chose to start the deal off by asking for a declaratory judgment just as any declaratory judgment Plaintiff would do and it wasn't that we snuck into court first as they would have you believe, it was that we initiated the proceedings.

THE COURT:

I don't think anybody snuck at all. I don't think of you all sneaking. I don't think of them as sneaking. I think it's two excellent admiralty firms just like a couple of yachts in the Americas Cup Race just before the start and they're on each others stern trying to get that six second jump at the start and what you had sitting up there was the general average to start with anyway.

MR. KOHLMEYER:

We couldn't help where they put the general average.

THE COURT:

I know that, but I'm just saying so that created the tension and then you all said let's see if we can get it going in the U.S. District Court, New Orleans, on a declaratory

judgment thing but we wouldn't serve anybody and in the mean time as soon as that is done, I don't know what the exact timing was. It doesn't seem to me that it's such a big deal anyway. Why not go ahead. The general average was there and everything was pretty much stirred up there and I realize it happened down here in the mouth of the river. What is wrong with that. And the gratuitous observation that how maybe things won't be all that fair in a Belgium court. Come on. Everybody knows how matters get litigated in Belgium courts that sit on the admiralty side. They get litigated about the same they do around here. There is no great shock to find a general average matter ultimately being resolved in an admiralty court in Belgium. That is not anything new for anybody.

MR. KOHLMEYER:

With due respect to you, it's a very violent assumption to say the procedures the process of Belgium Court as admiralty are the same as your court.

THE COURT:

I am saying it's not anything new for people participating in general average negotiations in Belgium to find that the ultimate litigation inures in a Belgium court and that is all I'm saying. Everybody knows how to deal with it.

MR. KOHLMEYER:

I frankly have no knowledge of that but I do know that we were supposed— that this case was called on February 4 or 8, I've forgetten which, and it was just last week or so and the plaintiff made no effort over there, the plaintiff, the P and I Club made no effort to move forward with the case and this I know not of my own knowlege but

cables I have received, and it's now on hold again for another six months to a year. This does not look as if they are attempting to press the case.

THE COURT:

There are going to be all sorts of representations, I'm sure from both sides about what is happening the Belgium form [sic] and it doesn't seem fair to either of you all for me to get into that. It's basically decided that it's a close call but that it should just go ahead and be dealt with in the Belgium form [sic].

MR. KOHLMEYER:

The other thing you didn't cover in your original opinion is the idea of relegating an American citizen to a foreign court and having the same, that foreign court case as if it were the same dignity.

THE COURT:

An American citizen, etc., if I thought I was taking some poor walking guy from Sycamore Street and sending him to Belgium. This is an American citizen in this sense. This is a P. and I. club that is as at home in Belgium as it is in New Orleans and you know that.

MR. KOHLMEYER:

You're talking about the British plaintiff over there.

THE COURT:

I'm talking about all the people involved here.

MR. KOHLMEYER

I think that this company probably writes worldwide insurance, yes but whether it litigates in Belgium courts, I

do not know. Certainly that has nothing to do with whether or not its rights are the same as they are in the United States Courts and it has nothing to do with relegating a United States citizen to litigate in a foreign court instead of letting the courts of their own flag litigate this. What we think would entitle to, if the the Court please.

THE COURT:

I understand. Let me hear briefly from the other side.

MR. SERVAY:

Ken Servay on behalf of the United Kingdom Mutual Steamship Assurance Association Limited. I don't have a lot more to say other than what I said in my three or four briefs other than what I said before in previous arguments. The only thing I'd like to point out right in the middle of 2760, I sent over to Court and to Mr. Kohlmeyer clearly notes this improper use of a declaratory judgment procedure. It's an attempt to get a judgment of nonliability which clearly is not within the scope of the act.

THE COURT:

Let me ask you this from a practical point of view. What is going on in Antwerp?

MR. SERVAY

I really don't know.

THE COURT:

Why don't you find out and let Mr. Kohlmeyer's office know. It seems to me one of the frustrations here that has been precipitous as far as all this is concerned is perhaps the lack of anything actually taking place. I don't blame them for that frustration. I don't have any doubt

about the fact that some American underwriting entity that finds himself without any clear signal about what is going on is bound to look for other forms [sic] in which to resolve their problems. Why doesn't anybody just find out what the heck is going on and move the matter along, get it resolved.

MR. SERVAY:

I was under the impression that it was moving along; the first I heard it wasn't was just now. There is every purpose for it to go on. There is security in Belgium and the case is going to go on in Belgium regardless of whether it stays here or not as well. It's a security that can be executed on in Belgium and I don't see any purpose in maintaining the action, certainly in the interest of judicial economy, to maintain this action.

THE COURT:

I'm going to let my judgment stand. It does seem to me that there should be a certain amount of communication going on here between these two New Orleans firms that do a lot of business with each other, in any event, to let each other know what is happening. I am sympathetic to Mr. Kohlmeyer's frustration on the part of his client if there is a big void they're asked to have this thing as being resolved. What is going to happen, what is going to be the procedural approach. How is it going to be dealt with. Let's get on it. I'm not going to recall my judgment. As far as I'm concerned, I decided it as best I can; it will have to be either appealed or accepted. I have done the best I can with it.

MR. KOHLMEYER:

May we prepare a judgment of dismissal so we can

take and appeal, if the Court please?

THE COURT:

Have you done that?

MR. SERVAY:

The final judgment was never signed.

THE COURT:

I'm going to sign it. If I need another copy, I'll let you know. You better check the record.

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

_____ _____

RHONA J. BALLARD, CSR DATE

OFFICIAL COURT REPORTER

APPENDIX B

GENERAL AVERAGE GUARANTEE

In consideration of the delivery to the Consignees thereof of the merchandise specified below without payment of deposit, WE, the undersigned underwriters, hereby guarantee the payment to the shipowners or their nominees of any contribution for General Average and/or Salvage and/or Particular and/or other charges which may hereafter be ascertained to be due in respect of the said merchandise and we further agree to make such payments on account as may be from time to time certified by the Average Adjusters to be due from us.

VESSEL: "CAPT. W.D. CARGILL"

VOYAGE: BATON ROUGE / HAMBURG

CASUALTY: 25th November, 1976.
Sacrifice of anchor and chain in action to stop the vessel in order to avoid collision - Forced detention off New Orleans for repairs.

DESCRIPTION OF CARGO:
44.400 L.T. SOYA BEANS in bulk
6.200 M.T. SOYA BEAN MEAL.

[stamp and signature]
Antwerp, 14th December 1976.

APPENDIX C

August 26, 1983

Mr. Donald A. Lindquist
Chaffe, McCall, Phillips, Toler & Sarpy
1500 First NBC Building
New Orleans, Louisiana 70112

Re: **M/V CAPT. W.D. CARGILL**
Our File: 77-0025-1760

Dear Don:

In accordance with our several conversation over the past couple of months, I hand you herewith a copy of the pleading which we filed late yesterday afternoon against the United Kingdom Club on behalf of the cargo underwriters on the CAPT. W.D. CARGILL, arising out of the pipeline incident which you handled for the Club a few years ago and which resulted in a general average being stated at Antwerp. Although I have no authority whatsoever and do not know the attitude of my principals, I suggest that they might be amenable to settlement negotiations if you wish to discuss compromise following the filing of responsive pleadings, but before proceeding to the merits of our claim. With this thought in mind, I did not order any service of process as yet.

Sincerely,

[Original signed by Mr. Charles Kohlmeyer, Jr.]

CK/kcl
bcc; Mr. L. Van Varenbergh

September 1, 1983

File No. 46690-DAL
Yr. File: 77-0025-1760

Charles Kohlmeyer, Jr. Esq.
Lemle, Kelleher, Kohlmeyer & Mathews
21st Floor Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

Re: **M/V CAPT. W.D. CARGILL**

Dear Charlie:

I refer to your letter of August 26, 1983, and will advise you in due course of the action we will take in this matter after conferring with the United Kingdom Club.

With kindest regards

Sincerely,

Donald A. Lindquist

DAL:ew

September 26, 1983

Mr. Donald A. Lindquist
Chaffe, McCall, Phillips,
Toler & Sarpy
1500 First NBC Building
New Orleans, Louisiana 70112

RE: **M/V CAPT. W.D. CARGILL**
Our File: 77-0025-1760

Dear Don:

This will confirm our telephone coversation of the other day wherein we discussed the amendment to the local Federal Court Rules and the potential effect of our failing to have service of process effected on the Club. I think it may mean that our suit will be dismissed if we do not have service made and if responsive pleadings are not filed reasonably promptly. Please therefore let me know what you intend doing, because if you cannot get approval to file and answer without our effecting service, I will have to order process to be issued and served by the Marshall or pursuant to the Long Arm Statute.

Sincerely,
[original signed by Mr. Charles Kohlmeyer, Jr.]

CK/kcl

OPINION

SUPREME COURT OF THE UNITED STATES

GREYHOUND LINES, INC. *v.* MELODY WILHITE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-2016. Decided October 15, 1985

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit held that *DelCostello* v. *International Brotherhood of Teamsters*, 462 U. S. 151 (1983) (actions brought under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, are governed by the six-month statute of limitations provided in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b)), was not to be applied retroactively because such retroactive application would shorten the applicable limitations period. *Compare Glover* v. *United Grocers, Inc.*, 746 F. 2d 1380 (CA9 1984) (applying *DelCostello* retroactively when doing so lengthened time for filing). In so holding, the Court of Appeals followed a prior decision in that court that relied on the factors outlined in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), in deciding this retroactivity question. See *Barina* v. *Gulf Trading & Transportation Co.*, 726 F. 2d 560, 563–564 (CA9 1984).

The decision below conflicts with those in other Circuits which have held that *DelCostello* should be applied retroactively. See, *e. g.*, *Smith* v. *General Motors Corp.*, 747 F. 2d 372 (CA6 1984) (en banc); *Graves* v. *Smith Transfer Corp.*, 736 F. 2d 819 (CA1 1984). Other Circuits have also held that the *Huson* analysis is not necessary to determine whether retroactivity is appropriate in this context. See, *e. g.*, *Welyczko* v. *U. S. Air, Inc.*, 733 F. 2d 239 (CA2), cert. denied, 105 S. Ct. 512 (1984); *Smith*, *supra*. I would grant certiorari to resolve these conflicts.